

Wewlesop



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Panama Canal Commission--Request for Advance Decision

File: B-224953

Date: January 9, 1987

## DIGEST

1. Where the government holds contract funds to which an unpaid subcontractor claims some right, the government may not enforce the subcontractor's rights against the prime contractor. The government has a nonenforceable equitable obligation, however, to see that subcontractors are paid and therefore should not make payment except under an agreement by all the parties or pursuant to an order of a court of competent jurisdiction.

2. Where the government receives a benefit from services under an agreement exceeding the contracting officer's procurement authority, and the government receives a benefit from the services, payment may be made on a quantum meruit basis--that is the reasonable value of the services.

## DECISION

A contracting officer of the Panama Canal Commission requests an advance decision regarding the disposition of funds owed under contract No. PC-1p-1648 with Twin City Shipyard (TCS) for the construction of a tugboat. The contracting officer reports that a Commission "acting contracting officer" made a "verbal commitment" to Michigan Wheel Corporation (MWC) that \$61,539.33 of funds due under the contract would be disbursed either to MWC or to MWC and TCS jointly if MWC would inspect potential damage to the tugboat's propulsion/rudder system while it was in the contractor's possession. The \$61,539.33 represents the amount TCS evidently owed MWC under a completed subcontract for the propulsion/rudder system. The contracting officer asks whether the amount in question should be disbursed to TCS, to MWC, or to both of them jointly.

The contracting officer explains that after MWC had provided the propulsion/rudder system, the tugboat was transported to the Gulf of Mexico for sea trials. During the trials,

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conducted while the tugboat was still in the contractor's possession and had not yet been accepted by the Commission, the propulsion/rudder sustained potential underwater damage, and the Commission desired that MWC inspect the system. MWC would provide no assistance until it was paid the \$61,539.33 owed it by TCS. The contracting officer further reports that it was evident at that time that TCS did not intend to pay MWC, and that it was under those circumstances that the "verbal commitment" was made to MWC, "thus convincing MWC to provide inspection services." The contracting officer states that other subcontractors have not been paid and TCS is going out of business.

Initially, we point out that to the extent that MWC asserts a right to the \$61,539.33 based on its subcontract with TCS, it is clear that there was no contractual relationship, or privity, between the government and MWC in connection with the furnishing of the propulsion/rudder system. Indeed, there are other parties that might assert some right to the funds. See Universal Aircraft Parts, Inc., B-187806, Jan. 11, 1979, 79-1 CPD ¶ 14.

The question remains, however, as to whether the actions of the parties here gave rise to a contractual obligation on the part of the government to pay MWC the \$61,539.33 for providing the inspection services. We have recognized that the government may contract directly with a subcontractor for the performance of services that might otherwise have been furnished under the prime contract, and that the contractual commitment may arise from the actions of the parties. See, e.g., Universal Aircraft Parts, Inc., supra. While it is clear here that the Commission's representative did deal directly with MWC and did induce it to provide the desired inspection services, the contracting officer does not state that the representative purported to obligate the government to pay MWC for the inspection services an amount equal to the more than \$61,000 owed to MWC by TCS. In this regard, we note the record does not indicate that MWC was the only firm that could capably provide the inspection services or that the reasonable value of the services even approached \$61,000.

Rather, it appears that the Commission's acting contracting officer made a "verbal commitment" to pay to MWC, or to MWC and TCS jointly, the \$61,539.33 that MWC was owed by TCS, and that funds owed by the Commission to TCS would be used for that purpose. This the acting contracting officer had no authority to do, since, as indicated above, there was no privity between the government and MWC regarding the

subcontract, and therefore no legally permissible way for the government to enforce the subcontractor's rights against the prime contractor by using funds due the prime contractor to pay the subcontractor directly. Since neither an express nor implied contract involving the government can arise from the unauthorized actions of its representatives, see H.C. Transp. Co., B-219600, Aug. 21, 1985, 85-2 CPD ¶ 207, we do not view the circumstances, as reported by the contracting officer, to have given rise to an enforceable contract against the government.

In the absence of a proper contract, the courts and this Office have recognized that where the government requests services not prohibited by statute or regulation, and receives a benefit, payment may be made for the services on a quantum meruit basis--that is, the reasonable value of the work or labor. See Bellinger Shipyard, B-212968, Apr. 10, 1984, 84-1 CPD ¶ 403; Honeywell, Inc., B-209173, Jan. 17, 1983, 83-1 CPD ¶ 47. Thus, since the Commission obviously has received a benefit from MWC's inspection services, MWC may be paid, from funds other than those committed to the TCS contract, for the reasonable value of the inspection services.

With respect to the contract funds remaining in the Commission's hands, we note the contracting officer's statement that other subcontractors also have not been paid and that TCS is going out of business. We further note that it has been recognized that the government has a nonenforceable equitable obligation to see that subcontractors are paid. United States Fidelity & Guaranty Co. et al. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); Dept. of Army--Request for Advance Decision, 63 Comp. Gen. 608 (1984), 84-2 CPD ¶ 335. Thus, in circumstances such as these, where the subcontractor has not been paid and where apparently there is no surety to pay the subcontractors, the government should retain the funds in question and not make payment except pursuant to an agreement by all of the parties or pursuant to an order of a court of competent jurisdiction. Dept. of Army--Request for Advance Decision, supra.

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